LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 30 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 80

JOHN E. RING,

Petitioner,

VS.

THE STATE OF NEW JERSEY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

CARL E. RING
Attorney for Petitioner
1701 Palisade Avenue
Union City, New Jersey

HUDSON DISPATCH, 404 38th Street, Union City, New Jersey

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1098

JOHN E. RING,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

The brief of the respondent (erroneously entitled "in opposition to petition for writ of certiorari to the Supreme Court of New Jersey", that Court having denied a petition for review) shows a state of confusion requiring the further determination of this Court.

The brief, P. 5, says:

> "The State accepts the contention of the petitioner that the double jeopardy provision of the Fifth Amendment of the United States Constitution is binding on the State of New Jersey through the Fourteenth Amendment."

It concludes, P. 9, that the matter should not be reviewed by the Supreme Court of the United States because the decision sought to be reviewed was:

> "based on well settled State decisional law."

It is clear from *Palko* vs. *Connecticut* that neither the Fifth Amendment double jeopardy provision nor the decisions of the Supreme Court of the United States thereunder are binding on the Courts of New Jersey.

Such acceptance by the "State", which in this case means only the prosecutor of Bergen County, is not sufficient to overrule the *Palko* case nor to bind the State Courts.

The fact that the Courts of New Jersey may have at times viewed questions of double jeopardy in light of the Fifth Amendment is immaterial if the State Courts are not constitutionally bound by the Fifth Amendment and the United States Supreme Court cases thereunder. We cannot speculate how the New Jersey Supreme Court would have ruled on the petition for review in this case if it was constitutionally bound by the Fifth Amendment and the federal cases thereunder, particularly *Sapir* vs. *United States,* 348 U.S. 373.

The general rule that there can be a new trial after reversal on appeal has at least one exception, as set forth in *Sapir* vs. *United States* (supra), that is, where the defendant was entitled to an acquittal erroneously denied in the lower Court and did not thereafter ask for a new trial.

In the present case, the petitioner was entitled to a mandatory acquittal as a matter of law in the County Court. He appealed only from the denial of such acquittal and did not, either in the County Court or the Appellate Division, seek a new trial. He applied

to the Appellate Division only to grant him what was improperly denied in the Trial Court, an acquittal. The Appellate Division sustained his right to an acquittal by vacating the conviction for insufficiency of proof.

The ends of justice demand not that the State have another chance to harass the defendant with a new trial but that the Appellate Division correct the error of the Court below and grant a final acquittal.

Such a result was reached in *Sapir* vs. *United States,* where Mr. Justice Douglas, P. 373, pointed out that:

> "If petitioner had asked for a new trial, different considerations would have come into play, for then the defendant opens the whole record for disposition as might be just,"

thus distinguishing *Bryan* vs. *United States,* 338 U.S. 552, on which the respondent relies. Again in *Forman* vs. *United States,* 361 U.S. 416, on which the respondent relies, there had been improper instructions to the jury and a motion for a new trial, and the Court pointed out, P. 426:

> "Moreover, Sapir made no motion for a new trial in the District Court while here the petitioner filed such a motion. That was a decisive fact in Sapir's case."

There is no basis for implied or expressed waiver of the defense of double jeopardy in this case. In *Green* vs. *United States,* 335 U.S. 184, Mr. Justice Black discarded the waiver theory, quoting Mr. Justice Holmes, who had said in an earlier case:

"Usually no such waiver is expressed or thought of. Moreover, it can hardly be imagined that the law would not correct a fatal error unless he should waive all rights so important as to be saved by an express clause in the United States Constitution."

The only error in the Trial Court was the failure of the trial judge to grant a mandatory acquittal. It is absurd to say that asking the Appellate Court to correct that error, which it did in part by reversing the conviction for insufficiency of proof, is a waiver of any constitutional right.

The only jurisdiction of the Appellate Division was to review the denial of a motion for an acquittal which had been properly raised in the County Court. Since there was no motion for a new trial, and hence no denial of such motion, there was no issue of a new trial within the appellate jurisdiction.

The Appellate Division has seized upon the error of the County Court denying an acquittal to create in itself an original discretionary jurisdiction to grant a new trial. Such error of the trial judge can justify only such power in the Appellate Division as is necessary to correct that error for the benefit of the defendant and does not justify a further penalty to the defendant.

To exercise this unwarranted claim of discretion, so as to deny the constitutional defense of double jeopardy to the defendant, is a most extreme abuse of discretion and violation of due process. This is particularly so because the Appellate Division based its

exercise of discretion solely on the failure to raise the point of insufficiency of proof in a prior nullified Municipal Court proceeding which was not on review in the Appellate Division, while it was compelled to reverse the conviction because in the subsequent trial de novo in the County Court, sitting as a Court of original jurisdiction, the point had been properly raised with opportunity to the prosecutor before final conviction to remedy the defect in proof if he could.

CONCLUSION

This writ of certiorari should be granted.

Respectfully submitted,

CARL E. RING
Attorney for Petitioner